Central Law Journal.

ST. LOUIS, MO., FEBRUARY 4, 1910

THE FEDERAL CORPORATION TAX.

We have been much interested in the discussions regarding the constitutionality of the federal corporation tax statute and particularity in an article in the Columbia Law Review for December, 1909, upholding the statute as constitutional. Neither, however, in that article, nor in those taking the other view, have we noticed a phase which appears to us to have important bearing in the matter. This phase involves the question of who pays the tax?

This again suggests the inquiry of what in its essence is income, and who or what is capable of enjoying, or receiving the benefit of, income?

There are numerous definitions of the word income in its more elastic sense, but the statute concerns itself with one sort only, viz.: net income. That income is what remains in the way of clear gain upon business operations, after first allowing for depreciation of property.

This being so, it may be asked whether a corporation has any capacity to enjoy and, therefore, to receive for its benefit, any net income? Corporations are those which are gainful and those which are not gainful. But in what and for what are they, or are they intended to be, gainful? The answer is evident that they are thus for their stockholders. And, if this were not so, they would never come into existence at all. Corporate property is an insensate slave managed by hired overseers.

Let us illustrate this by the well-settled law, that it is within the power of a court to compel a board of directors to declare a dividend. It is true, that it is ruled, that the courts will rarely compel such a declaration, because the discretion of the board is deferred to out of regard for other stockholders who make no complaint. If, however, the power of such compulsion exists, it is upon the theory, that a corporate body is a mere stakeholder, at the sufferance of the true owners of the profits. For a full citation of authority to this proposition we refer to Cook on Corporations, Sixth Ed., sec. 545.

But it may be said a corporation can enjoy and receive the benefits of net income by way of accumulating a reserve, or for anticipating indebtedness, or for extending and developing business. This, however, is merely for reasons of policy or management toward increasing dividends and in no wise in derogation of the principle that profits belong essentially to shareholders and are not assets of a corporation. A future discretion may bring assets back to mere capital. No debt against a corporation may conceivably affect its profits, for there are no profits which do not presuppose the extinguishment of debt.

Then we have reached this point. The net income an individual derives from his business and property is generally outside of the pale of federal taxation, except (if the federal corporation tax is constitutional) that part which accrues to him from investment in corporate stocks. And this is so (as must be the reason) because technically such income does not vest in the shareholders, until it is formally set apart by the declaration of a dividend.

It may well be conceded that taxation may be upon listing by, or assessment against, fiduciaries of any and every kind, but that is not the kind of a question which presents itself in the levying of this corporation tax. Such listing or assessment is for convenience. It affects in no adverse way the *cestui que trustent*. It creates no new imposition. If the property were not taxed in one hand it would be in another.

By the federal statute, however, property is sought in a "twilight zone" between capital and earnings, the former being corporate assets, the latter shareholders' assets. If the corporation can be said to have any title to the latter, it is fugitive, and perishable of its own instability. At most it is technical—the corporation being a naked trustee. Now, can it be fairly supposed that a fundamental law like the federal constitution contemplated that the taxation it

authorized should rest for its validity upon mere technical title, where there exists no beneficial interest? To our mind, such an interpretation reduces that great instrument to a level below that of a statute. It comes down to a particularization in the grant of powers, such as from an historical viewpoint no one could for a moment conceive was in the thought of the constitution's framers. They had nothing akin to corporation problems, which could have suggested, in the remotest way, that there could be any real distinction in taxation between income from investment in corporate stocks and that from investment in anything else. And, if they had supposed there ever might be, this would have been regarded to become more a matter of state policy than of national concern.

Taxation of a federal kind is more strictly, than that of states, purely *in rem* and when the *res* is in a national situation. It occupies no such situation when it belongs to a corporation or artificial being, rather than to an individual or natural being.

We consider, that it would be perfectly competent for a state to declare, that profits should vest absolutely in shareholders without the intervention of declaration of a dividend, and that a shareholder should have the right to demand his actual, rather than a declared, dividend. And we believe this would be the effect if in the absence of a statute providing for dividend declaring. We know the state protects capital stock by limiting declaration of dividends. Declaring dividends is regulation only. It is a mere dividing among owners of the whole, or a part of the whole, of their property. The state could say this division should be a certain percent of that whole and such would be a domestic policy. Dividend means that which must be divided. When the United States touches such policy, it assails state administration of the affairs of the creatures which it allows to come into existence. The power to tax is the power to destroy. A state encourages corporations. The United States discourages them. If the corporations are *quasi-public* its instrumentalities are taxed. It is established beyond the possibility of controversy, that state instrumentalities are as immune from federal taxation, as federal instrumentalities are from state taxation. See Collector v. Day, 11 Wall. 113; U. S. v. Railroad Co., 17 Wall. 322; Ambrosini v. U. S., 187 U. S. 1.

A summary then, of the situation is, that the right to tax corporations on their net income is based, if it exists at all, on mere technical ownership with the burden falling no more on it than on any other stakeholder or trustee, and this tax invades state policy in respect of something that has no federal aspect in any way whatever. As neither the burden nor the invasion seems constitutional, the statute ought to fall. The fight upon the law would appear more likely to succeed, if made by the owners of the profits than by their stakeholders—the corporations themselves.

NOTES OF IMPORTANT DECISIONS.

CRIMINAL LAW—CONSTRUCTION OF STATUTE MAKING PENAL FALSE REPORTS BY UNITED STATES BANKS.—In 70 Cent. L. J. 3 and 4 are referred to two decisions by the federal Supreme Court and one by the Eighth Circuit Court of Appeals touching the character of construction of penal statutes. We claimed that the latter court carried the rule of strict construction to the unreasonable length of defeating the plain purpose of legislation and that the two decisions of the former rejected that view. By another recent case, U. S. v. Corbett, 30 Sup. Ct. 81, our contention in this regard appears yet more plainly, the position of this same court of appeals being directly overruled. The overruled case is that of Clement v. United States, 149 Fed. 308, 79 C. C. A. 243.

In the Clement case it was held that Rev. Stat., section 5209, forbidding the making of "any false entry * * * * with intent * * * * to deceive * * * any agent appointed to examine the affairs of any such association" did not cover the making of a false report to the comptroller. The word "agent" was construed to mean subordinate agent appointed by the comptroller "to examine," etc.

The supreme court had said in Cochran v. United States, 157 U. S. 286, the word "agent" did also embrace the comptroller, and this case, though decided prior to the Clement case was not referred to by it. As no question of this kind was raised in the Cochran case, the Corbett case "considers the meaning of the section as an original question," the opinion being by Justice White, from which Justices Day and McKenna dissent.

Justice White, speaking of the rule of strict construction of penal statutes, says: "The

principle is elementary, but the application here sought to be made is a mistaken one. The rule of strict construction does not require that the narrowest technical meaning be given to the words employed in a criminal statute, in disregard of their context and in frustration of the obvious legislative intent." After quoting to like effect from United States v. Hartwell, 6 Wall. 385, the Justice then goes on to say: "It is to be observed that the rule thus stated affords us ground for extending a penal statute beyond its plain meaning. But it inculcates that a meaning which is within the text and within its clear intent is not to be departed from because, by resorting to a narrow and technical interpretation of particular words, the plain meaning may be distorted and the obvious purpose of the law may be frustrated."

That sort of statement comes quite nearly, as it seems to us, to doing away with the rule altogether.

It looks to us as if the Corbett case was correctly decided, but we feel some hesitancy in feeling that it required such a broad statement as Justice White has formulated. The comparison of other sections of the banking law with section 5209 well shows, that the comptroller was embraced in the word "agent," and, indeed, he is an agent, and, therefore, there is no plain meaning departed from in embracing him, though if the section stood alone he would not be held embraced. His duties under the act correspond to those of an agent, though in ordinary parlance he is called an officer. But so are subordinate agents officers.

SHALL CONGRESS BE GIVEN POWER TO ESTABLISH UNIFORM LAWS UPON THE SUBJECT OF DIVORCE AMONG THE STATES OF THE UNION.

The growing tendency of the American people to seek divorce, the apparent feeling in certain circles that the relation of husband and wife, that most sacred of all personal relations, is a mere legal ephemera, suggest serious and pressing questions worthy of investigation. Whether the evils resulting from our divorce law have or have not attained the dimensions portrayed by alarmists, they should be dealt with by our moral and political philosophers as things manifestly tending to degeneracy.

Whether or not uniform divorce laws should be established by congress among the states of the Union is a broad and intricate question.

In attempting to answer the above question, the utmost caution must be observed, in order that we fail not to discriminate between the moral and the legal phases of divorce. The hypothesis, in which we are given divorce laws, precludes the necessity of our passing upon the morality of divorce. In effect, the question is—Shall we unify various existing sanctions to the dissolution of the marital relation? Shall the states composing the Union surrender, by amendment to the constitution, their exclusive jurisdiction of divorce and authorize congress to pass uniform laws upon the subject. Common sense and good morals as well, suggest that such additional power be vested in the central government. Keeping ever in mind the fact that we are not to concern ourselves with the moral phase of divorce, let us investigate the present status of divorce in this country.

We find that with the exception of South Carolina, every state in the Union sanctions the dissolution of the marital relation through divorce laws each prescribing in what manner and upon what provocation the bonds of matrimony will be severed. According to the jurisdiction, the parties desiring legal separation find it more or less difficult to satisfy the courts that the necessary requisites to bring them within the sanction exist, that prescribed conditions obtain in their particular case. It will be observed that here, the moral phase of divorce more nearly coalesces with the legal phase than at any other point of our treatment, for granted that release from the marital bonds is itself moral, the grounds upon which in a given instance it may be sanctioned may be insufficient to the point of immorality. But again, let us recall that it is with the expediency of uniformity of the grounds only with which we are to deal.

What is it then that is claimed to create the necessity of uniform divorce laws among our states? The answer is that, the uncertainty of status as a result of the variance between the laws of our states

gives rise to abuses and evils which require a corrective. Then let us investigate this variance and weigh the materiality of the evils resulting therefrom.

The variance between the divorce laws of our states will be found to exist with respect to the grounds upon which a divorce may be obtained, as to matters of jurisdiction, as to matters of defense and lastly, as to the penalty imposed upon the guilty party or parties. Now let us consider each of these forms of variance in turn.

(1.) *Grounds.*—A careful study of the various grounds of divorce recognized in the different states will lead us to the conclusion that uncertainty of status does not result to such a degree from this as from the other forms of variance and that it concerns more intimately the right to a decree of divorce than the status of the parties as effected by such a decree. The minute we enter into a discussion of whether certain grounds as established by a state are proper or improper we are verging upon if not intruding upon the moral phase of divorce. Again, should we pursue the question of uniformity of grounds of divorce, because parties may now go into one state and secure a divorce on grounds held insufficient therefor in the state from which they came, we would intrude upon the matter of jurisdiction. For the present then, we will dismiss this form of variance as a cause of that uncertainty of status on account of which uniformity in our divorce laws is claimed to be necessary, and examine the variance of jurisdiction with which it is almost inseparably interwoven.

(2.) *Jurisdiction and Defense.*—For a most valuable treatment of the subject of "The Dissolution of the Marriage Status by Divorce," we refer to Minor's Conflict of Laws, Chapter VII. In this investigation we should confine ourselves to that portion of the above treatise dealing directly with matters of jurisdiction and defense, for the uncertainty of status now existing as a result of the various theories propounded by our states, and upon one or the other of which theories the states base their laws, will be clearly brought to view. In dealing with these several theories, Mr. Minor writes:

"Many theories have from time to time been advanced by the courts, some of which have been incidentally adverted to in prior sections of this work, and all of which have now been pretty generally discarded, except three leading ones. The first of these is entirely favorable to the resident plaintiff, sacrificing to the sovereignty of his domiciliary law all the rights of the defendant. The second is entirely favorable to the non-resident defendant, sacrificing the rights of the plaintiff to the sovereignty of the defendant's domiciliary law. It forces the plaintiff for the most part to sue for his divorce in the courts of the defendant's domicile, and requires him to subject himself to its laws. This theory is supported by the courts of New York, and may be designated "the New York doctrine." The third strikes a happy mean between the first and second, and while giving to the plaintiff all the rights conferred by his own law, permitting him to sue in the courts of his domicile, yet requires that the defendant should receive a more substantial notification of the existence of the suit than is afforded merely by a published advertisement in a newspaper of the plaintiff's domicile. This may be designated "the New Jersey doctrine," and is believed to be the soundest. The theories thus briefly outlined will now be elaborated more fully.

First Theory.—Jurisdiction over one party confers jurisdiction over the other also. According to the first theory, in order that the divorce court may have complete jurisdiction of the res, so that its decree will receive recognition everywhere as dissolving the relation of husband and wife, it is only essential that one of the parties should be domiciled there—it is immaterial which, though it will usually be the plaintiff. The courts of that party's domicile, having jurisdiction over his or her status, will draw to themselves, by reason of the mutuality of the marriage relation, jurisdiction of the status of the other party also, thus acquiring jurisdiction of the status of

both. The case (under this theory) is practically identical with that where both parties are domiciled within the limits of the state of the divorce, and the proceeding, as in that case, is regarded as one strictly in rem, the personal element of the proceeding being disregarded altogether. Hence (under this theory) only such notice is required to be given the non-resident defendant as is required by the municipal law of the state of divorce in order to give its courts jurisdiction—frequently nothing more than an advertisement published in some obscure newspaper of that state.

It will be observed that this doctrine upholds in full measure the sovereignty of the plaintiff's domicile with respect to his status, but in so doing it oftentimes permits grave (and very unnecessary) injustice to be done to the defendant, who frequently finds himself or herself divorced, without any previous knowledge whatever that proceedings for that purpose were pending. The laws and procedure of the plaintiff's domicile are devised to protect the plaintiff's interests, not those of the alien defendant. This constitutes the weakness of this theory. Its tendency is to violate that general principle of private international law that no man should be condemned unheard. It is a different case from that of a proceeding against property of the defendant. In that case a general publication is deemed sufficient because it is practically certain that the owner will be promptly notified of any blow aimed at his property. But his status is a more intangible thing, and more personal in its nature.

Second Theory.—Divorce a Proceeding in Personam.—So impressed have the New York courts been by the personal element in the suit for divorce, and the dangers threatening the non-resident defendant under the first theory that they have adopted as extreme (and unjust) a view in the other direction. According to this second theory, the personal element above mentioned preponderates, and causes a proceeding whose purpose is to dissolve a status to be regarded in the light of a proceeding in *personam* rather than a proceeding in *rem;* and the same process is required to bring the defendant before the court as is required if the design were to fasten upon him or her a general pecuniary liability. The New York courts hold that no foreign divorce obtained in a state where the plaintiff alone is domiciled will be valid exterritorially, unless the defendant voluntarily appears or is personally served with process within the territorial jurisdiction of the divorce court.

This theory gives undue weight to the personal element involved. It magnifies the rights of the defendant, and goes far to insure that no injustice will be done that party; but it will frequently be at the expense of the plaintiff and the sovereignty of the plaintiff's domicile. It practically, in many cases, forces a plaintiff who desires a divorce, at the very least to seek out the defendant, and sue in the state selected by the latter, for the very reason perhaps that its laws are more hostile to the plaintiff than his or her own; and, since the municipal laws of most states require the plaintiff to be domiciled in the state where he seeks a divorce, this theory would often compel him to abandon his own state altogether, and take up his permanent residence in the domicile of the defendant, or else forego his right to a divorce entirely. It pays no heed to the sovereignty of the plaintiff's domicile and its control over his status, which is just as pronounced as that of the defendant's domicile over the status of the latter. These are serious drawbacks to this theory—so serious indeed that it is not surprising that most courts have rejected it as unsound.

Third Theory.—Divorce Neither in Rem Nor in Personam, but Quasi in Rem.—Requires Best Notification Practicable to Non-Resident Defendant.—The third theory, adopted by the courts of New Jersey, is the best in point of reason, principle, and justice to all parties, combining as it does the advantages of both the other theories, and minimizing the disadvantages of both. According to this theory, the personal element entering into a divorce suit is neither disregarded to the extent of making the di-

vorce a proceeding in rem, nor so magnified as to make it a proceeding in personam. It is accorded its proper weight, and the divorce is regarded as a proceeding quasi in rem, that is, it is sufficiently a proceeding in rem to permit a court having jurisdiction of even part of the res to adjudicate upon it, without having to bring the person of the defendant within its jurisdiction, either by voluntary appearance or by service of process within the territorial limits of its authority; yet sufficiently in personam to require something more than a mere advertisement of the pendency of the suit, if more than that is practicable.

Full effect is thus given to the sovereignty of the plaintiff's domicile and to his or her rights. The plaintiff is permitted to get the full benefit of the divorce laws of his own state, and is not required to go to the state of the defendant and subject himself to its laws in order to obtain his divorce. The jurisdiction of the plaintiff's domicile over his status is recognized everywhere. The only limitation (and it is surely a most reasonable one) is that the nonresident defendant should be actually notified of the pendency of the suit, where that is practicable, by mail, message, or actual service of notice (not by advertisement merely).

This affords almost every protection to the defendant which is obtained by the New York rule, and at the same time leaves the plaintiff's rights and the sovereignty of the plaintiff's domicile untrammeled, save by a regulation for the protection of the absent defendant, which, while it can do the plaintiff no injury, affords a protection against the prostitution of justice, which it should be the lofty aim of every system of law to prevent.

This theory does not absolutely demand in all cases, in order to an exterritorial recognition of divorce, actual notice to be given the defendant, but only that the best notice practicable be given him or her. If his address is known, actual notice in some form is necessary; if unknown, only reasonable notice and opportunity to be heard is required. Of course, therefore, the voluntary appearance of the defendant will supersede the necessity for specific notice.

It will be remembered that when the decree directs that the guilty party shall not marry again, the better opinion is that such part of the decree is in personam, not in rem, and hence the court is without jurisdiction to make such a decree against a nonresident defendant, unless he or she has voluntarily appeared, or (perhaps) has been personally served with process within the territorial jurisdiction of the court. And even, then, such part of the decree, being in the nature of a penalty, will be given no exterritorial effect."

From this presentation it is clear how uncertain may be the status of divorced parties upon a change of domicile if viewed from the standpoint of the new jurisdiction, and in many cases when viewed from the standpoint of the domiciliary law itself. No argument should be required to impress upon an intelligent mind the expediency of unification as to matters of jurisdiction and defense, for the abuses which the existing variance here leads to are manifest. What argument in favor of such variance can be sustained? Certain states may attract persons to its jurisdiction by the laxity of its requirements with respect to divorce and derive thereby much benefit commercially speaking, but is divorce a subject to be handled by a board of trade? Emphatically, no.

In keeping before us the proposition that the pulse of social morals is indicated by tribunals of justice, we are not relying upon that phase of divorce to support our own contentions, which we have denied to our opponents.

Penalty.—Some states impose a penalty upon the guilty party in a divorce proceeding which attaches a disability to contract a subsequent marriage. Binding as such a disability may be within the jurisdiction of the court imposing the penalty, it is easily overcome by the penalized party resorting to some jurisdiction where no such disability attaches to the guilty party. In such jurisdiction, a valid marriage may be con-

tracted and the contracting parties enabled to return to the original jurisdiction and dwell as man and wife, recognized as such, by the very courts which imposed the disability. In other words, the variance between the laws of the several states makes possible a complete evasion of the law of some of those states. What reason may be brought to the support of such a legal anomaly? Then too, certain questions with regard to other incidents of divorce, such as costs and alimony arise, creating the greatest bewilderment and militating against that certainty of status which is claimed to be expedient. To what end is such confusion of service to the states.

What say the opponents of unification of our divorce laws? Three general arguments will be advanced:

First.—The usual argument against the amendment of the constitution. It will be said that the constitution would have included such a provision had the states deemed it wise to delegate this power to congress; that to give the central government this additional power is to diminish the reserve power of the states to too great an extent, etc., etc.

Such arguments do not in any way deny that the divorce laws should be uniform among the states. In fact, by implication, we may infer a tacit acknowledgment at least, on the part of the propounder of such an argument that he is not opposed to unification itself, but merely to the further delegation of power to the central government.

The powers delegated to the central government group themselves under two heads.

(1.)—*Powers Incident to the Sovereignty of the United States.*

(2.)—*Powers Which it was Deemed Expedient that the United States as a Sovereignty Should Exercise.*

To the latter class belongs the power of congress to establish uniform laws among the states on the subject of bankruptcy. The exercise of this power by congress was permitted on the grounds of expediency and not because of some innate peculiarity of insolvency. The evils growing out of the lack of uniformity of the laws among the states on the subject of bankruptcy required energetic curtailment for the good of the states themselves and each state had come to know by bitter experience that no state by itself was able to eradicate those evils, which by their very nature were the outgrowth of co-existing sovereignties over whose jurisdictions it could exercise, no control. Since the evils then were general and each state was individually unable to destroy them, to say that the states delegated to congress the power to make uniform laws on the subject of bankruptcy is erroneous, since a power never in the states could not be disposed of by them. The states however, did surrender to a certain extent their power to legislate as to bankruptcy, a power at times utterly unavailing in themselves, and by reason of such surrender specified that congress might make uniform laws on that subject. In other words, by surrendering a power which was ineffective in their own hands against a deadly evil, the states were immeasurably benefitted under the common weal. And so the right which each state now reserves to make its own laws on the subject of divorce can in no way be used to the eradication of the evils due to lack of uniformity of the divorce laws among the several states. No state may now eradicate the evil growing out of the practice of its own citizens seeking the sanction of other jurisdictions to acts contrary to the laws of their own community, since no state has the power to make uniform laws upon any subject among all the states and, therefore, to enable congress to make such laws would not be to take such a power from any or each of the states. It is true that each state would be divested of a power, that of making its own divorce laws, but by a general surrender of this right the states would authorize congress to correct the abuses which they themselves are now powerless to reach. It is true also that the power of congress would be increased, but to the great benefit of the states, assuming that uniform divorce laws would be bene-

ficial, which our opponent so far has not denied.

Second.—There are many, however, who will contend that uniform divorce laws are not desirable on the ground that the laws governing divorce should be peculiarly influenced by local policy; they will take the ultra-conservative view that divorce laws are local issues, that environment, territorial circumstance and peculiarities in the organization of societies render a difference in such laws quite necessary among the states of the Union. Facts do not support such a contention.

Let us consider three typical sections of the United States, each comprised of a number of states in which the organization of society is very similar, as a result of a common religious and social influence. First let us take that section comprised of Virginia, North Carolina, Kentucky and Tennessee. An examination of the laws of these states will disclose the fact that there are twenty-two grounds of absolute divorce recognized by one or the other of the four.[1]

Of the twenty-two grounds, but two are common among the four states, namely: (a) Adultery and (b) pregnancy of wife at time of marriage unknown to husband. Of the remaining twenty grounds, but two are common to three states (Virginia, Kentucky and Tennessee), (a) Abandonment, etc.; (b) Conviction of felony, etc. Two others are common to Kentucky and Tennessee, (a) Cruelty, etc.; (b) Habitual drunkenness, etc., while seven of the remaining sixteen grounds are recognized only in Tennessee, six only in Kentucky, two only in Virginia, and one only in North Carolina.

Are the differences between the societies of Virginia, North Carolina, Kentucky and Tennessee, so great as to demand such variance in their laws? In answering this question it should be borne in mind that one of the only two grounds common to the members of this group is recognized by every state in the Union which recognizes divorce, while the other is recognized by such states as Wyoming and Iowa, Kansas, Missouri, and West Virginia, besides most of the gulf states, far removed from the influence of the Virginia group. It is only reasonable, therefore, to deny that the peculiar needs of society are consulted by the states of that group in the adoption of laws establishing the grounds of divorce.

A second section of the United States in which society is similar to a marked degree among the states comprising it, is composed of the states of New York, Massachusetts, Connecticut, Rhode Island, New Hampshire, Vermont and Maine. Among these seven states we find twelve grounds of absolute divorce recognized with adultery as the only common ground. Two grounds only, viz.: (a) Abandonment, etc.; (b) Cruelty, etc., are common to six of the seven states in this group. Failure or neglect of husband to provide for wife is a ground common to the five states of Massachusetts, Rhode Island, New Hampshire, Vermont and Maine, and habitual drunkenness, etc., is a ground common to the five states of Massachusetts, Rhode Island, New Hampshire, Connecticut and Maine. Conviction of felony, etc., is a ground common to four states; impotency to three states; a religious provision to two states, one ground is recognized only in Connecticut, while the last two of the twelve grounds are recognized only in Rhode Island.

Here again, we are unwilling to grant that, such social dissimilarities exist among the people of New York and the six New England States, as to justify such variance among their divorce laws.

With the exception of Louisiana, the States of the Mississippi Valley have been too greatly influenced by Virginia and Carolina, or New England and New York, to afford a distinct original social group. Let us pass on then to the Pacific Coast, where a conglomerate society exists, a society which, while distinct, is not original, and which as a whole owes its character neither to the direct influence of the Cava-

[1] It is possible that these figures may not be exact, due to recent changes in the laws of the various states.

Authorities consulted: Reports of Commissioner of Labor. Marriage and Divorce.

lier and Scotch-Irish elements of Virginia and Carolina, nor to the Puritan influence of New England, New Netherlands and New France.

Taking California, Oregon and Washington then as our third group, we find among them, eleven grounds of absolute divorce. Five of these grounds are common to the three states, two are common to Oregon and Washington, one is common to California and Washington, and the remaining three are recognized only in Washington.

Are we not constrained to ask if the character of the Washingtonian is so entirely dissimilar to that of the Californian that necessity, by reason of territorial circumstance and local peculiarities demands eleven grounds of divorce for the former, while but five seem necessary for the latter! Wherein consists the necessity?

In this third group the variance becomes all the more unwarranted when we consider the newness of the country as regards the inhabitants; the absence of segregated societies as a result of traditions and local attachments. In our eastern groups, some slight weight may be given to the plea of local issue for there, customs, the offspring of time, of three centuries of friction, revolution, and social segregation, accentuate locality. While it is true that, the sea, the mountains, the desert or the forest, may influence the race which dwells within their respective confines, yet the weight of time alone can make the impression, and we find no such factor entering into the problem of our Pacific group.

Third.—There will be found those also who argue that unification of the divorce laws of the several states would necessarily disturb the present status of many, and affect the marriage relation in general. Such arguments will be advanced more frequently by persons from sections of our country, wherein persons of African descent are to be found in large numbers, mixing promiscuously with the whites. It is plain to see that the fear of miscegenation prompts such an argument.

The answer to such an argument is that divorce presupposes a valid marriage. To divorce, means to separate from the condition of husband and wife, and only those can assume that relation who have been united in lawful wedlock. There can be no baron unless there be a femme. Since this is true, unification of the laws governing the release of man and woman from the marital obligation does not concern the question of who is and who is not married. That question is left as before for the states to decide to their own satisfaction, and should they make provisions rendering miscegenation unlawful, there can be no baron and femme upon which the congressional laws could act, for the laws which congress would be empowered to make, would merely prescribe in what manner and upon what grounds those already married might be released from that relation.

The three great arguments against unification of the divorce laws among the states have been generally stated above, and a brief refutation only has been attempted, but have we not indicated the general lines along which the fallacy of those arguments is to be established?

It would appear that more forceful objections must be advanced, than those usually brought forth, in order to justify a refusal on the part of the states to authorize congressional control of the subject of divorce, and thereby correct many of the abuses attendant upon, and the evils resulting from our present system.

If divorce, as a legal institution, is to exist in one form or another amongst our people, is it not desirable that a common and well-defined channel be staked out for those seeking its haven? Is it not eminently wise that the divorce court be circumscribed by uniform safe-guards among our people, and shall we not establish a supreme tribunal to pronounce the sanction of dissolution from that most sacred of all our relations?

Surely the great weight of reason leads us to regard with favor the unification of our laws on the subject of *divorce*.

JENNINGS C. WISE.

Richmond, Va.

HOMICIDE—DRUNKENNESS AS DEFENSE.

STATE v. RUMBLE.

Supreme Court of Kansas, November 6, 1909.

That drunkenness may have rendered one charged with a crime incapable of knowing the nature and quality of his act, or of distinguishing between right and wrong, does not constitute a defense.

MASON, J.: Charles Rumble was convicted of murder in the second degree, and appeals. It was admitted that he shot and killed, without any provocation or apparent cause, a man who, so far as the evidence shows, was a total stranger. The theory of the defense was that he was insane. The state maintained that he was merely intoxicated. The most important assignments of error relate to the exclusion of evidence bearing upon the question of his sanity, and to the instructions given and refused regarding the effect of drunkenness.

Witnesses were produced in behalf of the defendant who testified, in effect: That they had known him for several years and had had opportunity to observe his usual conduct; that they had noticed at different times peculiar and eccentric actions on his part, which they described in detail. They were then asked whether in their judgment he was sane or insane. Objections were sustained to all questions of this character. Ordinarily the rejection of such evidence is reversible error. State v. Beuerman, 59 Kan. 586, 53 Pac. 874. The state contends, however, that the testimony here excluded was objectionable or immaterial for some or all of these reasons. (1) It did not specifically refer to the condition of the defendant at the time of the homicide; (2) the witnesses said that the defendant bore a good reputation as a quiet and peaceable citizen, and this was inconsistent with the theory of insanity; (3) the witnesses were not shown to have had sufficient opportunity of observation to render their opinions of any value; (4) the facts detailed by the witnesses had no tendency to justify a belief that the defendant was insane. Of these propositions it may be said, in order:

1. The evidence rejected did not specifically relate to the precise time of the homicide; but this was not necessary, for the defense was obviously based on the theory that some form of mental derangement had existed for a considerable period.

2. A good general reputation was not necessarily incompatible as unsoundness of mind, manifested at intervals.

3. One of the witnesses had known the defendant more than six years, and had lived near him for over four years, not immediately prior to the homicide, however. Another had known him for nine years and had worked with him at different times, once for two months, eight years before the trial, and once for an unstated period within a year. This court has said that "whether there is a fair basis for an opinion must be left largely to the trial court." Kempf v. Koppa, 74 Kan. 153, 155, 85 Pac. 806, 807. But clearly the acquaintance of each of these two witnesses with the defendant was sufficiently intimate for the formation of a judgment as to his mental condition. As was said in the same case: "The courts do not undertake to lay down a definite rule as to how closely the witness must have observed the person whose sanity is the subject of inquiry in order to be qualified as a witness, as even a casual observer may discover mental manifestations that would make his testimony valuable."

4. The incidents detailed by the witnesses may not in themselves have justified a conclusion that the defendant was insane; but that was not necessary in order to render the evidence admissible. One of the cogent reasons for allowing a witness to give his opinion as to the sanity of the person the condition of whose mind is under investigation is that he cannot possibly place before the jury every circumstance that has influenced his judgment in the matter. As was said in Zirkle v. Leonard, 61 Kan. 636, 637, 638, 60 Pac. 318: "If all the facts on which the opinion is based could be placed before the jury, the latter could judge of the sanity or insanity as well as the witness; but there are certain indicia of mental disorder which are indescribable. Peculiar conduct, acts, and deportment of the person may create a fixed and reliable judgment in the mind of an observer which could not be conveyed in words to the jury. A person may appear to be sad, dejected, sick, or well, yet such appearance could not be described satisfactorily, and hence a conclusion is permitted to be given."

The court has never decided that a lay witness who has had opportunity to observe the conduct of a person whose sanity is called in question may not give an opinion upon the matter without first stating in detail the facts that have been observed, although this has sometimes been assumed in a general statement of the rule. Baughman v. Baughman, 32 Kan. 538, 543, 4 Pac. 1003; State v. Beuerman, 59 Kan. 586, 589, 53 Pac. 874. A more accurate expression was formulated in Howard v. Carter, 71 Kan. 85, 91, 80 Pac. 61, 63, in these words: "It is well settled in this state that a

nonexpert witness may be permitted to give his judgment as to the sane or insane state of another's mind after having detailed to the jury the extent of his opportunities to deduce a correct opinion and judgment thereon." See also, Grimshaw v. Kent, 67 Kan. 463, 73 Pac. 92. A belief that a person is of sound mind could hardly be said to be founded upon any number of specific acts. Where an opinion has been formed that a person is insane, and testimony to that effect is offered, it is important that any instances of unusual conduct shall be stated, not necessarily to render the witness competent, but to aid the jury in placing a just value upon his conclusions. A statement of facts detailed by the witness tends to affect the weight to be given to his opinion, affording the court or jury opportunity to judge of his intimacy with the person about whom he is testifying, his facilities for observation, and the acuteness with which he has discerned peculiarities which might escape the notice of others." Zirkle v. Leonard, 61 Kan. 636, 638, 60 Pac. 318. In Commercial Travelers v. Barnes, 75 Kan. 720, 90 Pac. 293, the rule is thus stated: "Nonexpert witnesses shown to have had especial opportunities of observation are allowed to give opinion evidence of the mental condition of one under investigation in this respect, having first stated the facts upon which such opinions are based, or without stating such facts when opportunity is given to cross-examine in reference thereto." This is in accordance with the weight of authority and the better reason. See 3 Wigmore on Evidence, sections 1933, 1935, 1938, 1922.

A physician, who had examined the defendant a few months after the shooting, was asked to testify concerning his mental condition, but was not permitted to do so. The ground of this ruling is not clear; but in the brief of the state it is suggested that the question was too indefinite as to time. It seemed to relate, however, to the time of the examination, and on that theory was pertinent. State v. Newman, 57 Kan. 705, 47 Pac. 881, 16 A. & E. Encycl. of L. 614. The question of the defendant's guilt turned solely on whether he was insane. Inasmuch as he was not allowed to try to establish his insanity by the testimony of nonexpert acquaintances—one of the well-recognized means of proving such a fact—it cannot be said that he was given a fair opportunity to prove himself innocent. The trial court took the view that, to whatever extent the defendant may have been intoxicated, he was guilty of murder in either the first or the second degree, or was innocent; that his voluntary drunkenness might prevent his act from being first degree murder by rendering him incapable of deliberation and premeditation, but could not upon a similar principle prevent it from being murder in the second degree. This was evidenced by an instruction reading as follows: "If you find that the defendant committed the act of killing as charged in the information, and that at the time he did so, he was in a state of intoxication, caused by his voluntary action, he is guilty of murder in the first degree, unless you further find that such intoxication was so extreme as to prevent his mind from the exercise of deliberation and premeditation, in which latter case he would be guilty of murder in the second degree."

Drunkenness, if so extreme as to make the existence of a definite purpose impossible, may be a defense to any crime of which a specific design is an essential element. "To regard the fact of intoxication as meriting consideration in such a case is not to hold that drunkenness will excuse crime, but to inquire whether the very crime which the law defines has been in point of fact committed." 17 A. & E. Encycl. of L. 407. If a person is too drunk to form an intent to kill, he cannot be guilty of any offense for the commission of which such intent is necessary. State v. White, 14 Kan. 538. At common law murder may be committed without any actual design to take life (21 Cyc. 712), and therefore drunkenness can be no defense to that charge (12 Cyc. 174, note 77). Under some statutes which divide murder into degrees, an involuntary homicide may be murder in the second degree. 12 Cyc. 174, note 78. In Craft v. State, 3 Kan. 450, 482, it was inaccurately said that to constitute murder at common law an intention to take life must precede the killing, and that whatever act would have been murder at common law is murder under the Kansas statute, being classified at first or second degree according to whether or not it was done deliberately and with premeditation, but in State v. Young, 55 Kan. 349, 355, 40 Pac. 659, it was held, following the Ohio decisions, that the use of the word "purposely" in defining second degree murder implies the existence of an intention to cause death, and this is the interpretation elsewhere placed upon that language. 21 Cyc. 712, note 50. It necessarily follows that drunkenness so extreme as to prevent the forming of a purpose to kill might, under our statute, reduce what would have been murder at the common law to manslaughter, and in a proper case instructions to that effect should be given. See cases cited in subdivision 5 of note in 36 L. R. A. 470, under subhead "Intent," and 12 Cyc. 172. It is to be borne in mind, however, that "the fact of intoxication, no matter how complete and overpowering, is not conclusive

evidence of the absence of an intent to take life," (State v. White, 14 Kan. 538, syllabus), and, as said in Zibold v. Reneer, 73 Kan. 312, 320, 85 Pac. 290, 293: "For a person to be too drunk to entertain an intent to kill, it would seem that he would have to be too drunk to entertain an intent to shoot."

The court also gave this instruction: "If the defendant shot said Frank J. Emery, as charged in the information, and at the time of said shooting he was intoxicated, the mere fact that he may have been intoxicated at said time furnishes no excuse for the killing of said Frank J. Emery, unless his intoxication was of such a degree that he was incapable of knowing the nature and quality of the act of shooting said Emery, or of distinguishing between right and wrong." This was too favorable to the defendant. "It can make no difference, where no specific intent is necessary, that the defendant was so drunk as to have no capacity to distinguish between right and wrong." 12 Cyc. 172. "Mental incapacity produced by voluntary intoxication, existing only temporarily at the time of the criminal offense, is no excuse therefor, or defense to a prosecution therefor. * * * The test of insanity as affecting criminal responsibility, that the accused must have labored under such a defect of reason as not to know the nature or quality of the act, or, if he did know it, that he did not know he was doing wrong, does not apply to drunkenness." 36 L. R. A. 466, note. "Temporary insanity immediately produced by intoxication does not destroy responsibility for crime, where the accused, when sane and responsible, voluntarily made himself drunk. To constitute insanity caused by intoxication a defense to an indictment for murder, it must be a settled insanity, and not a mere temporary mental condition." 17 A. & E. Encycl. of L. 405.

The county attorney submits that the homicide could not constitute manslaughter, because in any view of the evidence the facts did not bring it within any of the statutory definitions. No reason, however, is apparent why an instruction might not properly have been given under section 12 of the crimes act (Gen. St. 1901, section 1997). State v. Spendlove, 47 Kan. 160, 28 Pac. 994. The objection made to the applicability of sections 18 and 26 is that they involve the element of "heat of passion." That term, however, has a wide range of meaning. Section 27 includes any inexcusable and unjustifiable killing of a human being not otherwise classified by the statute that at common law would have constituted manslaughter.

It is not thought necessary to consider other assignments of error, as the questions to which they relate are unlikely to arise again.

The judgment is reversed, and a new trial ordered. All the Justices concur.

NOTE—*Intoxication as Affecting Criminality in Homicidal Cases.*—The principal case is in line with general authority as we believe. But we submit some forms of instructions by various courts and comments by courts and will subjoin thereto one or two observations.

In Wright v. Com., 24 Ky. Law Rep. 1838, the opinion by Judge Poynter refers to Bishop v. Com., 22 id. 468, for a review of opinions for the proposition that temporary insanity, occasioned by the act of one getting drunk, is no excuse for the commission of homicide. The Wright case approved an instruction that if a lack of reason upon the part of defendant to know right from wrong, or sufficient will power to govern his actions, or to control his impulses, arose alone from voluntary drunkenness, and not from mental unsoundness, he was not excusable for that reason. The conviction in this case was for murder and it was affirmed. The Bishop case in its review of Kentucky decision quotes the following from Keeton v. Com.: "The testimony offered should have gone to the jury so that they might determine the *intent* of the accused when he made the assault. It has been held by this court, in more than one case, that drunkenness is no excuse for crime, and constitutes no defense even in a case of homicide where the accused was unconscious of the nature of the act, if that condition of his mind was the result of voluntary intoxication with a knowledge of the effect of liquor on his passions; still it has been adjudged in these same cases that the physical and mental condition of the accused at the time of the homicide is competent to show an absence of malice, and thus reduce the crime from that of murder to manslaughter. Malice being one of the essential ingredients of murder if the accused was so unconscious as evidenced his want of capacity to entertain malice, then his offense is manslaughter."

In Missouri the following instruction was approved: "The court instructs the jury that in making up their verdict they will entirely disregard all the testimony with reference to the defendant being drunk, and that drunkenness cannot be pleaded in excuse, mitigation or defense of any crime." State v. West, 157 Mo. l. c. 318, approved in State v. Brown, 181 id. l. c. 212.

In Wilson v. State, 60 N. J. L. 171, the following instruction was sustained by a vote of 7 to 5: "It is an essential ingredient of the crime of murder in the first degree that there should be an intent to take life; any intoxication may be considered with reference to the existence of that intent and its wilfull, deliberate and premeditated character, and I charge you that, if, at the time of doing the act, the evidence shows you that this defendant was so intoxicated that his faculties were prostrated and he was rendered incapable of forming a specific intent to take life, then, although it is no defense and no justification for crime, his offense may thereby be mitigated to murder in the second degree."

The opinion cites from Coke, Hale, Blackstone and Bacon, that "such a person shall have no privileges by his voluntary contracted madness, but shall have the same judgment as if he were in his right senses." Its correctness was defend-

ed by Mr. Justice Park and Mr. Justice Littledale on the ground that otherwise: "There would be no safety for human life." Then the New Jersey court announces: "That the true rule, in my judgment, to be deduced from the authorities, is that there is a situation in which the fact of drunkenness is entitled to weight, not as an excuse for crime, nor in extenuation of it, but as a fact tending to show that the crime imputed was not committed. When the character and extent of a crime is made by law to depend upon the state and condition of the defendant's mind at the time, and with reference to the act done, intoxication as a circumstance affecting such state and condition of the mind, is a proper subject for inquiry and consideration by the jury."

But the minority of five thought this instruction too harsh, the dissent saying: "The question upon which this court is divided is whether the intoxication that may be considered by the jury upon the degree of murder must be such as rendered the defendant incapable of forming an intention to kill, or whether it may be such as satisfies the jury that as a matter of fact such an intention did not exist." The minority thought the latter theory was the more correct, because by the former rule: "The burden of proving the defendant's guilt and the quantum of proof were in no wise shifted or varied by the introduction of the defendant's testimony as to his intoxication." And because "a reasonable doubt might spring out of the drunkenness of defendant." Then it is argued that there are stages of intoxication which might produce a doubt about deliberation, etc. The instruction was said to require defendant "to prove that his faculties were so prostrated that he was incapable of premeditation," making in effect the presumption of sobriety the same as presumption of sanity.

In Brown v. State, 142 Ala. 287, it was said: "Voluntary drunkenness excuses no man for the commission of a crime which does not involve a specific intent, regardless of the nature and character of his mental condition as a result therefrom. The most that can be claimed on subject is, that the fact of excessive drunkenness is sometimes admissible to reduce the grade of the crime, when the question of intent, malice or premeditation is involved." That case approved a prior case holding partial intoxication unavailable to disprove specific intent. Accused must be incapable of knowing right from wrong, or having any consciousness of crime, and there must be stupefaction of the reasoning faculty.

The California Supreme Court referred to its statute to the effect that no act committed by a person while in a state of voluntary intoxication is less criminal for this reason, except when specific intent is a neecssary element, which brings the matter to the jury. The court said upon this: "But a sane person who voluntarily becomes intoxicated is not relieved from responsibility because of any mental derangement, *mania a potu*, or insanity produced by and consequent upon his own voluntary act." Then the court distinguishes a permanently diseased brain from chronic alcoholism placing the victim in the same category as the congenitally insane. People v. Fellows, 122 Cal. 233.

In Thomas v. State, 47 Fla. 99, the Supreme Court says: "Intoxication does not excuse or mitigate any degree of unlawful homicide, except murder in the first degree, unless as a result of such intoxication there be a fixed or settled frenzy or insanity, either permanent or intermittent."

In State v. Williams, 122 Iowa, 115, the court quotes an instruction which said among other things: "If a person is sober enough to intend to shoot at another and actually does shoot at and hit him, without justification therefor, then the law presumes that such person is sober enough to form the specific intent to kill the one he shot at, and in such cases is criminally responsible for the act," and "if defendant was sufficiently sober at the time of the shooting to distinguish between right and wrong and to form a specific intent, then the defense of drunkenness cannot avail him." Defendant was convicted of murder in the first degree and there was a reversal. The court said the "instruction should have plainly told the jury that, if from the evidence it found, that defendant was so drunk that he was incapable of forming an intent to do the act complained of, they should find him not guilty of the crime of murder. To this should have been added an instruction to the effect that his intoxicated condition should also be considered as bearing upon the degrees of his offense."

In Kempton v. State, 111 Wis. 127, the instruction was: "If you find from the evidence that he fired the shot which killed his wife, and if, when he did so, he was in such a condition from the use of spirituous liquors that he was not capable of forming a premeditated attempt to kill her, then you should consider the question of intoxication and you cannot convict him of murder in the first degree. But if he was able to form that intent to kill, willfully, deliberately and premeditatedly, when he fired the shot, then you must have nothing more to do with the question of his drinking and you should give it no further thought or consideration in the case, for then it cuts no further figure."

It was held that this was substantially in accord with Wisconsin decision and the prevailing rule on the subject. Then the court quotes an instruction "as a strictly accurate statement of the law" as follows: "If you shall find, etc., that this defendant at the time he struck the blow was in such condition from the use of spirituous liquors that he was incapable of forming an intent, then you may consider the question of intoxication. The question simply is, in short, was he at the time in such a condition mentally as to be incapable of forming the premeditated design to affect the death." But the opinion in the Kempton case also speaks as follows:: "Courts have been very slow to break down the old common law doctrine as regards the effect of voluntary intoxication of a person at the time of the commission of a criminal offense by him. Formerly it was held to aggravate rather than mitigate the offense. Now, if from passion stimulated by intoxication, or from any other cause, a person, for the moment, is unable to exercise his reason, and while he is in such condition, though conscious of what he is doing and not so completely bereft of reason as to be legally irresponsible, he is uncontrollably moved thereby and does wrongfully kill another, he cannot be convicted of murder in the first degree. Clifford v. State, 58 Wis.

477. It is the condition, no matter how caused, overpowering and controlling reason, which reduces the offense to some lesser degree of criminal homicide. If reason, notwithstanding the intoxication or other disturbing cause, be not so completely dethroned, so to speak, but that the wrongdoer can exercise judgment, he must do so or pay the penalty of being held responsible for his acts regardless of such disturbing cause."

The theory about voluntary intoxication comes from our common law, as is remarked by the Wisconsin court. But we doubt whether it is in accord with American conception. The common law does not confine itself with such absolute strictness to the overt act doctrine as we do. We have no such crime as misprison of treason, for instance. The decision just rendered by a federal circuit court in the World Publishing Company-Panama libel case bespeaks strongly the American idea. But the voluntary intoxication idea is distinctly non-American. In its final analysis it could go to many things. For example, if one had a settled hatred for another he should refrain from going where he might come in contact with him, though he went with no intention to come in conflict with him, if he knew the sight of him of whom he felt hatred would probably or possibly lead to an encounter. In many other ways this "voluntary" theory might be applied, if even we know what the term embraces. Participating in a social gathering where intoxicants will be served in the way of hospitality might be such. We might also say that if voluntary gluttony would cause peevishness, then one killing another in that humor would lend aggravation to his offense. If a man gets drunk so as to nerve him to a particular deed of violence that is a different matter, but to say intoxication, whether voluntary or involuntary, may not assist in determining the existence of intent and its quality in the killing of a stranger does not seem in accordance with the nature of human passions. A man's own horror of his deed proves the contrary. And besides, what man really and certainly knows himself sufficiently to be held responsible, beyond a reasonable doubt, in drunken situations. He may have been a drunkard for years and quarrelsome merely in his cups and neither he or anyone else would expect murder at his hands.

The variety of expression by the courts seems to show that they wish to hold users of intoxicants to a sense of responsibility in fortuitous crime, when the state licenses the sale of what they use. It would look as if this policy made the state *particeps criminis*. It says in one breath drink what I commend, but if it impels you to crime that fact is not to be urged by you against me. Sudden passion, hot blood, etc., disproves or tends to disprove premeditation, but if it is a circumstance that would not reasonably produce hot blood in a sober man, the state says an accused shall not be allowed to show it might in a drunken man, if his reason was not dethroned. An insult may be fancied by a drunken man. Shall it not be permitted to show he was drunk?

We hold no brief for drunkenness, but we do believe, that it is competent to show the interpretation placed, whether rightly or wrongly, by one who acts upon a supposed provocation. If a state gets revenue from liquor selling, responsibility for the evil consequences thereof ought not to be repudiated by its courts. C.

ENGLISH AND CANADIAN DIGEST.

REPORT OF RECENT IMPORTANT ENGLISH AND CANADIAN CASES FOR THE WEEK.

Railway—Goods—Notice that Certain Goods Would be Carried in Future at Owner's Risk Only, Unless Properly Packed—Alleged Unreasonableness of Notice.—By section 7 of the Railway and Canal Traffic Act, 1854: "Every such company as aforesaid shall be liable for the loss of, or for any injury done to, any . . . articles, goods, or things, in the receiving, forwarding, or delivering thereof, occasioned by the neglect or default of such company or its servants, notwithstanding any notice, condition, or declaration made and given by such company contrary thereto, or in any wise limiting such liability, every such notice, condition, or declaration being hereby declared to be null and void; provided always that nothing herein contained shall be construed to prevent the said companies from making such conditions with respect to the receiving, forwarding, and delivering of any . . . articles, goods, or things, as shall be adjudged by the court or judge before whom any question relating thereto shall be tried to be just and reasonable." A railway company gave notice that they would not in future carry certain flushing cisterns with projecting levers, unless they were properly protected by packing, except at owner's risk, owing to the relatively large number of these cisterns which got damaged in carriage. The plaintiff, after this notice, sent cisterns of this sort unpacked, and one being damaged, he claimed 30s. in the county court, alleging that the notice was bad as being unreasonable. The Divisional Court, affirming the judgment of the county court judge, decided in favor of the plaintiff.

Held, by Buckley and Kennedy, L.JJ. (Vaughan Williams, L.J., dissenting), that, on the facts proved, the notice limiting the company's statutory liability as carriers of these cisterns was not unreasonable, and that the company were entitled to judgment.—Sutcliffe v. Great Western Railway Co., No. 1. App. Cas. rendered Dec., 1909.

Wills—Precatory Trust.—Where words of gift were used which by themselves were sufficient to give an absolute interest, that interest could not be cut down to a trust estate or to a life estate, with a trust for disposal after the determination of the life by a mere expression of desire that the property should be left by the donees to charitable purposes or another person. Here the property was given to the sisters of the testator absolutely, and their interest was not cut down by words as to the effect of which there was serious doubts.—In re Conolly, Chancy. Div., Dec. 15, 1909.

HUMOR OF THE LAW.

At a dinner attended by the late Governor Johnson, a New York millionaire said, in reference to his taxes: 'I've got a little piece of property that brings me in a fair rental, and the tax gatherers haven't spotted it yet. I don't know whether I ought to tell them or not. What would you do, Governor Johnson?"

The Governor's eyes twinkled. "It's the duty of every man," he said, "to live unspotted. Still if I were you, I'd pay up."—Washington Star

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort and of all the Federal Courts.

California 11, 56, 76, 78, 86, 103
Georgia 18, 64
Kansas 40
Louisiana 91
Michigan 1, 15. 24, 38, 49, 50, 54, 71, 74, 83, 84, 95, 113, 116, 120.
Minnesota 115
Mississippi 4, 48
Nevada 65
New Jersey 21, 28, 30, 42, 46, 55, 80, 82, 85, 90
New York ..... 3, 8, 9, 12, 13, 14, 16, 17, 22, 23, 25, 26, 29, 33, 34, 35, 37, 39, 41, 53, 61, 67, 68, 70, 72, 73, 79, 89, 92, 94, 97, 98, 99, 100, 101, 102, 104, 105, 106, 107, 109, 114, 118.
Ohio 60
Oklahoma 19, 27, 43, 66, 108
Oregon 47, 96
Pennsylvania 2, 119, 121
South Dakota 5, 31, 51, 52, 63
United States S. C. 57, 58, 59, 69, 110
Washington ..... 20, 32, 44, 45, 62, 77, 81, 87, 93, 111, 112, 117.
Wisconsin 6, 7, 10, 36, 75, 88

1. **Adverse Possession**—Streets.—Owners of adjacent lands by erecting structures in streets for their private benefit can acquire no permanent rights in the streets.—Weber v. City of Detroit, Mich., 123 N. W. 540.

2. **Alteration of Instruments**—Addition of Name of Witness.—Addition of witness' name to signatures to instruments without the obligors' knowledge held a material alteration.—Shiffer v. Mosier, Pa., 74 Atl. 426.

3.——Authority of Holder.—Under Negotiable Instruments Law (Consol. Laws, c. 38) sec. 33, the holder of a note not providing for interest, or having any blank in which to add the words "with interest," held not authorized to add such words.—Usefof v. Herzenstein, 119 N. Y. Supp, 290.

4. **Appeal and Error**—Jurisdiction of Court on Appeal.—The Supreme Court, after obtaining jurisdiction on appeal, will not allow any disposition of the cause by the nominal parties, where the equitable interest of third persons will be prejudiced.—Sivley v. Sivley, Miss., 50 So. 552.

5.——Motion for New Trial.—Where a verdict is directed for plaintiff, motion for new trial is not a condition precedent to review on appeal.—Albien v. Smith, S. D., 123 N. W. 675.

6.——Right to Second Appeal.—A second appeal cannot be taken while former appeal is pending.—Cruzeu v. Merchants' State Bank of St. Hilarie, Minn., 123 N. W. 659.

7. **Arbitration and Award**—Agreement.—A party cannot complain that an arbitrary agreement provided for no notice of hearing before the arbitrator and none was given, where he was present at such hearings.—Travelers' Ins. Co. v. Pierce Engine Co., Wis., 123 N. W. 643.

8. **Associations**—Agreements Under Seal.—Where an agreement between two unincorporated associations is under seal, members of one of the associations cannot maintain an action against the other association upon the agreement; they not being named as parties to the instrument.—Barzilay v. Lowenthal, 119 N. Y. Supp. 612.

9. **Attachment**—Affidavit.—An affidavit for an attachment, failing to allege the source of affiant's knowledge or to show facts justifying him in making the averment on personal knowledge, held insufficient.—N. Dain's Sons Co. v. Thomas McNally Co., 119 N. Y. Supp. 625.

10.——Amendment.—Where by an amendment in attachment other claims are included which were not due at the commencement of the suit nor at the date of an intervening mortgage, the attaching creditor waived his attachment, and his lien by the judgment subsequently rendered was of the date of the judgment only.—Bever v. Dobeas, Wis., 123 N. W. 638.

11. **Attorney and Client**—Suspension of Attorney.—The practicing of law by one occupying a judicial position is not one of the causes for removal or suspension of an attorney.—Baird v. Justice Court of Riverside Tp., Cal., 105 Pac. 259.

12. **Bankruptcy**—Liability of Receivers.—A receiver held not individually liable for rent of premises subleased by the bankrupt.—Alexis v. Koehler, 119 N. Y. Supp. 664.

13. **Banks and Banking**—Payment of Forged Check.—A depositor, who signed checks in blank, is liable to the bank for money paid on a check which was stolen and filled out by an unauthorized employee.—Trust Co. of America v. Conklin, 119 N. Y. Supp. 367.

14.——Rights and Liabilities.—Negotiable Instruments Law held not to apply to a bank paying a forged check, purporting to be drawn by one of its depositors, not given to pay any existing or antecedent debt of the depositor or forger, and not to prevent recovery by the bank on account of the payment so made.—Title Guarantee & Trust Co. v. Haven, N. Y., 89 N. E. 1082.

15. **Benefit Societies**—Domicile.—The migratory headquarters of a beneficial association organized under the law of the state cannot control the jurisdiction of its courts when the rights of its citizens are involved, and the domicile of the association controls in such case.—Golden Star Lodge No. 1 v. Watterson, Mich., 123 N. W. 610.

16.——Increase in Rate of Assessment.—A beneficial insurance association held not entitled to increase the rate of a single assessment after a member entered into his contract of insurance.—Dowdall v. Supreme Council of Catholic Mut. Ben. Ass'n., N. Y., 89 N. E. 1075.

17. **Bills and Notes**—Bona Fide Holders.—Under Negotiable Instruments Law, the defense of usury held not available against a bona fide holder of a note.—Klar v. Kostiuk, 119 N. Y. Supp. 683.

18.——Duebill.—Indorsee of duebill containing no words of negotiability takes it subject to all defenses.—Mackin v. Bialock, Ga., 66 S. E. 265.

19.——Illegal Consideration.—Maker of note seeking to avoid it for want of jurisdiction or for illegal consideration has the burden of proof.—Tinker v. Midland Valley Mercantile Co., Okl., 105 Pac. 333.

20. **Boundaries**—Establishment.—In an action by a vendee against the vendor to establish a boundary, the fact that plaintiff has obtained from a third person a quitclaim deed to a strip of land between conflicting surveys does not affect defendant.—Aiken v. Boyd, Wash., 104 Pac. 1101.

21. **Brokers**—Confidential Relations.—Agent agreeing to negotiate for the purchase of land for another cannot purchase on his own account one of the tracts and hold it against the interest of his principal.—Rogers v. Genung, N. J., 74 Atl. 473.

22.——Sale of Stock.—The rule that, where one of two innocent persons must suffer for the act of a third, he that employs and puts trust and confidence in the wrongdoer should be the loser, may be invoked against brokers selling stock and warranting forged signatures to a blank assignment without knowledge of the forgery.—Bassett v. Perkins, 119 N. Y. Supp. 354.

23. **Cancellation of Instruments**—Surrender of Benefits.—Plaintiff, in a suit to set aside a void contract with her husband, prior to divorce, held bound to restore the benefits received to the extent of her ability.—Lake v. Lake, 119 N. Y. Supp. 686.

24.——Undue Influence.—The wife, joining her husband in the execution of a contract, is a necessary party to rescind it, on the ground of fraud and undue influence.—Borchert v. Borchert, Wis., 123 N. W. 550.

25. **Carriers of Goods**—Bill of Lading.—A carrier held not entitled to deliver goods until presentation of the bill of lading.—Lyons v. New York Cent. & H. R. R. Co., 119 N. Y. Supp. 703.

26.——Liability as Warehouseman.—Where the liability of a carrier sued for loss of goods was

that of a warehouseman only, plaintiff must show negligence on the part of the carrier in the care of the goods.—Lyons v. New York Cent. & H. R. R. Co., 119 N. Y. Supp. 703.

27.——Limitation of Liability.—The common-law liability of a carrier may be limited by special contract with the shipper (executed in October, 1904).—Chicago, R. I. & P. Ry. Co. v. Wehrman, Okl., 105 Pac. 328.

28.——Limitation on Value of Goods.—A shipper must be presumed, at least prima facie, to have read a receipt, limiting the express company's liability as to the value of the goods, and to have assented to it.—Florman v. Dodd & Childs Express Co., N. J., 74 Atl. 446.

29.——Special Damages.—A carrier is liable for special damages for delay in delivery, where notice of special consequences of delay is given. —Gledhill Wall Paper Co. v. Baltimore & O. R. Co., 119 N. Y. Supp. 623.

30. **Certiorari**—Review.—In reviewing by certiorari a judgment of the district court, all intendments will be taken in favor of the judgment.—New Jersey Produce Co. v. Gluck, N. J., 74 Atl. 443.

31. **Chattel Mortgages**—Description of Property.—The description of property mortgaged in a chattel mortgage, and permission given by the mortgagee to remove the same to a specified location, held sufficient to identify the property mortgaged.—Albien v. Smith, S. D., 123 N. W. 675.

32. **Contracts**—Consideration.—Failure to pay the consideration moving to a public service corporation is, as a rule, a bar to an action for not rendering the service under such contract, brought by the party failing to pay.—State v. Mountain Spring Co., Wash., 105 Pac. 243.

33.——Husband and Wife.—A contract between a husband and wife from which she could procure no benefit except from the event of dissolution of marriage held contrary to public policy, and void.—Lake v. Lake, 119 N. Y. Supp. 686.

34.——Performance.—A contractor employing a subcontractor held not entitled to demand reimbursement for failure of the subcontractor to perform specified things.—Murphy v. Number One Wall Street Corp., 119 N. Y. Supp. 693.

35. **Corporations**—Foreign Corporations.—The indorsement in the state to a foreign corporation of a note executed in the state held not the doing of business in the state.—People's Sav. Bank of Bay City, Mich., v. Fulton Contracting Co., 119 N. Y. Supp. 622.

36.——Right to Acquire Real Estate.—The inability of a corporation to acquire title to any property cannot be raised by a stranger claiming the property, but can only be questioned by persons directly interested in the corporation or by the state.—Illinois Steel Co. v. Warras, Wis., 123 N. W. 656.

37.——Sale of Stock.—A warranty by brokers, indorsed on a certificate of stock sold by them, of the genuineness of signatures to a blank assignment of the certificate, is not a special, but a general, continuing warranty.—Bassett v. Perkins, 119 N. Y. Supp. 354.

38.——Transfer of Assets to Partnership.—Where the assets of a corporation transferred to a partnership exceed the corporate debts assumed by the partnership, a creditor of the corporation is entitled to make the debt out of the assets and to a lien thereon, enforceable if the partnership does not pay, though the firm is not personally liable.—Midland County Sav. Bank v. T. C. Prouty Co., Mich., 123 N. W. 549.

39. **Courts**—Appealable Orders.—An order of the New York Municipal Court denying an application for a reargument of a previous motion to open an alleged default judgment is not appealable.—Percy v. Sire, 119 N. Y. Supp. 225.

40.——Change of Venue.—The court is not bound to grant a change of venue for the prejudice of the judge, though accused's affidavit is not contradicted.—State v. Tawney, Kan., 105 Pac. 218.

41. **Covenants**—Restrictive Building Covenant. —A restrictive building covenant in a deed held not to prevent the building of a private garage as an addition to a dwelling.—Beckwith v. Pirung, 119 N. Y. Supp. 444.

42.——State of Demand.—State of demand on contract for payment of money need not allege demand, where it is not required by the contract sued on.—De Jianne v. Citizens' Protective Ass'n of New Jersey, N. J., 74 Atl. 443.

43. **Criminal Law**—Failure to Call Wife as Witness.—Held not improper to instruct that the wife is not a competent witness against her husband, but that he may call her if he desires. —Rhea v. Territory, Okl., 105 Pac. 314.

44.——Limiting Argument of Counsel.—It was not an abuse of discretion, or a denial of defendant's constitutional right, to limit his counsel to 15 minutes argument to the jury, in a prosecution for the violation of a city ordinance.—City of Seattle v. Erickson, Wash., 104 Pac. 234.

45.——Want of Arraignment.—That a jury was sworn, and the state began the examination of prosecutrix before accused had been arraigned and pleaded, held not ground for mistrial.— State v. Kinghorn, Wash., 105 Pac. 234.

46. **Deeds**—Loss or Relinquishment of Rights. —That a deed is not recorded or is lost held ineffectual either to devest the legal estate or revest it in those appearing as owners of record. —Lake v. Weaver, N. J., 74 Atl. 451.

47.——Sufficiency of Description.—The description of the property conveyed must be sufficient to identify it with reasonable certainty, but a tract may be conveyed by a distinguishing name by which it is known without reference to the boundaries.—St. Dennis v. Harris, Or., 105 Pac. 246.

48. **Dower**—Estate Acquired.—Where the owner of land died, leaving a widow and three children, the land descended to his children, subject only to a lower interest, and on the widow's death the property descended to a surviving child.—Barrier v. Young, Miss., 50 So. 559.

49. **Easements**—Right-of-Way.—One having means of access to his premises over his own lands cannot acquire a prescriptive right-of-way over adjoining lands by an occasional use for his own convenience.—Menter v. First Baptist Church of Eaton Rapids, Mich., 123 N. W. 585.

50. **Eminent Domain**—Public Necessity.—In proceedings to condemn land for a public use, evidence of the damaging effect of the taking to any portion of the public is competent to aid the jury in determining whether there is a public necessity for the taking.—Board of Education of City of Grand Rapids v. Brown, Mich., 123 N. W. 562.

51. **Evidence**—Admissions.—The admission of an agent to bind the principal must be a part of the res gestae.—Jungworth v. Chicago, M. & St. P. Ry. Co., S. D., 123 N. W. 695.

52.——Fraudulent Conveyance.—Evidence that personal property was assessed to an alleged seller, and not to the alleged buyer, for many years after the sale, is inadmissible to show fraud.—Comeau v. Hurley, S. D., 123 N. W. 715.

53.——General Reputation.—That a person is unmarried may be established by general reputation in his family.—Jacobs v. Fowler, 119 N. Y. Supp. 647.

54.——Judicial Notice.—In the absence of proof of the law of a foreign country, the court on appeal cannot determine that the foreign law defeats an action.—Carnell v. Halpin, Mich., 123 N. W. 578.

55.——Parol Evidence.—Where an assignment of a chose in action admits of two interpretations as to the subject-matter, parol evidence is admissible.—New Jersey Produce Co. v. Gluck, N. J., 74 Atl. 443.

56.——Weight and Sufficiency.—A party bringing out testimony of a witness by making the witness his own witness is bound by his statements, though they may be a conclusion of the witness.—Reclamation Dist. No. 70 v. Sherman, Cal., 105 Pac. 277.

57. **Extradition**—Race Prejudice.—The mere suggestion that the alleged fugitive from justice will not receive a fair and impartial trial in the demanding state because of his color does not require the executive of the surrendering state to refuse to surrender him, nor furnish a ground for relief on habeas corpus.—Marbles v. Creecy, U. S. S. C., 20 Sup. Ct. 32.

58. **Federal Courts**—Jurisdiction.—Federal court of chancery has jurisdiction where proper

diversity of citizenship exists to determine interest of an heir in an alleged lapsed legacy, and consequent increase in the residuary estate.—Waterman v. Canal-Louisiana Bank & Trust Co., U. S. S. C., 30 Sup. Ct. 10.

59.——Title to Land Below High Water.—The contention that rights below the high-water mark of navigable nontidal waters can be asserted by patentees from the United States as appurtenant to the uplands as against the title of the state held too clearly unfounded to raise a federal question within the original jurisdiction of a federal court.—McGilvra v. Ross, U. S. S. C., 30 Sup. Ct. 27.

60. **Fire Insurance**—Mortgage Clause.—Under mortgage clause, mortgagee held bound by award of appraisers, though he was not a party to the appraisement.—Erie Brewing Co. v. Ohio Farmers' Ins. Co., Ohio, 74 Atl. 1065.

61. **Fixtures**—Partitions.—Partitions placed in the rooms of an office building by the lessee held trade fixtures, and not "fixtures" technically, so as to make them annexed to the realty.—United Booking Offices v. Pittsburg Life & Trust Co., 119 N. Y. Supp. 216.

62. **Fraud**—Fraudulent Representations.—Fraudulent representations by the active partner to the co-partner to obtain a settlement of the firm affairs held material, and, when relied on by the copartner to his injury, the essential elements of fraud exist.—Salhinger v. Salhinger, Wash., 105 Pac. 236.

63. **Frauds, Statute of**—Parol Gift.—A parol gift of land to a child will be sustained, notwithstanding the statute of frauds, after possession and the making of permanent improvements.—Cook v. Cook, S. D., 123 N. W. 693.

64. **Fraudulent Conveyances**—Sale of Stock in Trade.—Act Aug. 17, 1903 (Acts 1903, p. 92) regulating the sale of merchandise in bulk, does not apply to a sale of all lumber manufactured at a sawmill.—Cooney, Eckstein & Co. v. Sweat, Ga., 66 S. E. 257.

65. **Gaming**—Pledge to Secure Gambling Debt.—A pledge of stock to secure note given in payment of a gambling debt is void.—Menardi v. Wacker, Ney., 105 Pac. 287.

66. **Homicide**—Self-Defense.—Before self-defense would arise upon threats, some act must be done by decedent indicating a purpose to carry such threats into execution.—Rhea v. Territory, Okl., 105 Pac. 314.

67. **Husband and Wife**—Mortgage of Wife's Property.—A husband is not a necessary party to a mortgage on the separate property of his wife.—Hope v. Seaman, 119 N. Y. Supp. 713.

68.——Purchases by Wife.—Husband held not liable for apartment decorations furnished to his wife, in the absence of proof that they were necessaries or that he had authorized the purchase.—Proctor v. Woodruff, 119 N. Y. Supp. 232.

69. **Indians**—Trust in Tribal Lands.—No trust exists in favor of members of a tribe and their descendants because of letters patent, following the language of Choctaw Treaty, Sept. 27, 1830 (7 Stat. 333) art. 2, under which the patent was made, granted to the Choctaw Nation a tract of land in fee simple.—Fleming v. McCurtain, U. S. S. C., 30 Sup. Ct. 16.

70. **Injunction**—Contempt.—A stranger to a suit in which an injunction issued held not subject to punishment for contempt for violating the injunction.—In re Zimmerman, 119 N. Y. Supp. 245.

71.——Nature of Remedy.—Injunctive relief is not a matter of right, but of discretion, and plaintiff must show that he is equitably and in good conscience entitled thereto, in addition to showing equitable grounds for relief.—Campau v. National Film Co., Mich., 123 N. W. 606.

72.——Summary Proceedings.—A complaint to restrain a landlord from bringing summary dispossession proceedings, alleging an oral agreement to renew the lease, held to state a cause of action, notwithstanding Real Property Law.—Greimel v. O'Conor, 119 N. Y. Supp. 660.

73. **Innkeepers**—Property in Guest's Possession.—An innkeeper, having notice that a piano delivered to his guest was not the guest's property when delivered, held not to have a lien thereon, under Lien Law (Laws 1909, p. 17, c. 38, Consol. Laws, c. 38) sec. 181.—Lurch v. Brown, 119 N. Y. Supp. 637.

74. **Interstate Commerce**—State Regulation.—The state has power to regulate the sale to consumers by retailers within its borders of adulterated food properly shipped into the state and sold to the retailer in interstate commerce.—Armour & Co. v. Bird, Mich., 123 N. W. 580.

75. **Judgment**—Against Tort Feasors.—Where two persons jointly commit a tort, and the administrator or executor of one of them is substituted as a codefendant with the other wrongdoer, the judgment at law cannot ordinarily be a joint judgment against the survivor and the executor or administrator of the deceased wrongdoer.—Borchert v. Borchert, Wis., 123 N. W. 628.

76.——Against Wrongdoers for the Same Act.—Different judgments against different wrongdoers for the same wrongful act may be for different amounts, and the same result may follow where there is one action against all the wrongdoers.—Cole v. Roebling Const. Co., Cal., 105 Pac. 255.

77.——Motion to Vacate.—Whether a motion to vacate a tax judgment constituted a general or special appearance, the judgment and order denying the motion held binding on the moving parties, and final until set aside.—Flueck v. Pedigo, Wash., 104 Pac. 1119.

78. **Landlord and Tenant**—Estoppel.—Payment of rent by persons employed to manage premises for a lessee held not to create an estoppel against lessor, suing them on the lease.—Russell v. Banks, Cal., 105 Pac. 261.

79.——Fixtures.—Partitions of a temporary nature, erected by the lessee of rooms in an office building, held not "improvements," but "movable office furniture," within the meaning of the lease, and removable by the lessee.—United Booking Office v. Pittsburg Life & Trust Co., 119 N. Y. Supp. 216.

80.——Trespass.—A landlord cannot sue in trespass for injury to land in the exclusive possession of his tenant, but his action should be in case.—Van Ness v. New York & N. J. Telephone Co., N. J., 74 Atl. 456.

81. **Libel and Slander**—Special Damages.—Only special damages which must be pleaded and proved are recoverable in an action of slander of title.—McGuinness v. Hargiss, Wash., 105 Pac. 233.

82.——Truth as Defense.—The truthfulness of a libel is a complete defense to a civil action.—Merrey v. Guardian Printing & Publishing Co., N. J., 74 Atl. 464.

83. **Life Estate**—Incumbrance.—A life tenant purchasing the property at the foreclosure of a mortgage because of his failure to pay interest held not to acquire a title which will defeat the right of the remaindermen.—McCall v. McCall, Mich., 123 N. W. 550.

84. **Life Insurance**—Cancellation of Policy.—An insurance company suing to set aside a policy obtained by fraudulent misrepresentations must restore the premiums received as a condition of relief.—Metropolitan Life Ins. Co. v. Freedman, Mich., 123 N. W. 547.

85.——Change of Beneficiary.—Rule that an original beneficiary of a policy is entitled to the value thereof up to the time the beneficiary is changed from the proceeds when the policy becomes a claim does not apply to industrial insurance.—Metropolitan Life Ins. Co. v. Hooppell, N. J., 74 Atl. 467.

86.——Loan on Policy.—Where a loan agreement between insurer in a life policy and insured and the beneficiary was fully executed prior to the death of insured, the beneficiary could not urge that the loan agreement was ultra vires.—Frese v. Mutual Life Ins. Co. of New York, Cal., 105 Pac. 265.

87. **Evidence**—Lost Instruments.—To establish a lost instrument, the evidence must be such as to leave no reasonable doubt as to its terms.—Scurry v. City of Seattle, Wash., 104 Pac. 1129.

88. **Master and Servant**—Dangerous Appliances.—Servants deliberately choosing a dangerous appliance, when a safe one was furnished for their use, held negligent.—Pierson v. Citizens' Telephone & Telegraph Co., Wis., 123 N. W. 642.

89.——Duty of Master.—A master is not required to adopt the safest and best known methods of performing his work, but only such as are reasonably safe, and as would be adopted by

a person of ordinary care and prudence.—Ozogar v. Pierce, Butler & Pierce Mfg. Co., 119 N. Y. Supp. 405.

90.——Duty to Instruct Servant.—A master must instruct his servant as to dangers of which he knows or ought to know, and of which the master knows, or ought to know, the servant has no knowledge.—Ramsey v. Raritan Copper Works, N. J., 74 Atl. 437.

91.——Fellow Servant.—An employer held liable to an employee injured by another servant in the performance of different work under their common employment.—Taylor v. E. C. Palmer & Co., La., 50 So. 522.

92. **Mechanics Liens**—Repairs by Lessee.—That lessor watched, or even passed on, improvements by lessee, removing partitions and painting and plastering, and for which a lien was claimed, held not to show that they desired to obtain the benefit thereof.—Garber v. Spivak, 119 N. Y. Supp. 269.

93. **Money Paid**—Leases.—An assignee of a part of a leasehold having paid the entire reserved rent, the law would imply a promise on the assignor's part to repay a proportional part.—Johnson v. Zufeldt, Wash., 104 Pac. 1132.

94.——Recovery of Voluntary Payment.—Money paid without any request or authority from the parties liable to pay the same is not recoverable in an action at law.—Title Guarantee & Trust Co. v. Haven, N. Y., 89 N. E. 1082.

95. **Money Received**—Actions.—The right to bring an action for money had and received held to exist when one has in his possession money which, in equity and good conscience, belongs to another.—Hoyt v. Paw Paw Grape Juice Co., Mich., 123 N. W. 529.

96. **Mortgages**—Assignment.—An indorsee of a note secured by a mortgage is the owner of the mortgage without a further assignment thereof.—Stitt v. Stringham, Or., 105 Pac. 252.

97.——Foreclosure.—A deed, pursuant to a foreclosure decree, purporting to convey the fee, conveys all the title and interest of the parties to the action as of the date of the giving of the mortgage.—Hope v. Seaman, 119 N. Y. Supp. 713.

98.——Foreclosure and Resale.—The assignee of a purchaser on a resale under a mortgage foreclosure judgment, held not entitled to complain of the refusal of the court to determine, on motion, the ownership of after-acquired property.—Knickerbocker Trust Co. v. Oneonta, C. & R. S. Ry. Co., 119 N. Y. Supp. 304.

99. **Municipal Corporations**—Change of Street Grade.—The person who is damaged by the change of grade of an adjoining highway, so as to be entitled to compensation, is the one who owns the property when the change is made.—People v. Stillings, 119 N. Y. Supp. 298.

100. **Negligence**—Res Ipsa Loquitur.—The doctrine of res ipsa loquitur applies, though the precise act of negligence is not specified, where the accident is one which could not ordinarily have happened without negligence.—Levine v. Brooklyn, Q. C. & S. R. Co., 119 N. Y. Supp. 315.

101. **Nuisance**—Injunction.—Right to injunctive relief against a nuisance is not a matter of absolute right, but rests on the conscience and discretion of the court.—Raymond v. Transit Development Co., 119 N. Y. Supp. 655.

102. **Parties**—Designation of Individual.—That "James Benjamin Oric Shevill" was named in a summons and complaint as "Benjamin J. Oric Shevill" did not make him the less a party to the action.—Hope v. Seaman, 119 N. Y. Supp. 713.

103.——Joinder of Defendants.—Two or more jointly engaged in a tort are jointly and severally liable as the injured party may elect, and he may sue all or any jointly, or each separately.—Cole v. Roebling Const. Co., Cal., 105 Pac. 255.

104. **Partnership**—Payment by Check.—Delivery by a debtor of a check to the agent of the creditor held a payment as between the debtor and creditor, though the agent forges an indorsement and steals the money.—Burstein v. Sullivan, 119 N. Y. Supp. 317.

105.——Rights of Surviving Partner.—The surviving partner is the legal owner of the firm assets, and the only right of the representative of the deceased partner is to have the copartnership affairs liquidated.—Reinhardt v. Reinhardt, 119 N. Y. Supp, 285.

106. **Perjury**—Materiality of Testimony.—Materiality of false testimony held an essential ingredient of perjury.—People v. Teal, N. Y., 74 Atl. 1086.

107. **Principal and Agent**—Scope of Authority.—An agent for collection of rent and ordinary repairs held not to imply power to agree to pay for, or even authorize, improvements by a tenant, involving removal of partitions and painting and plastering.—Garber v. Spivak, 119 N. Y. Supp. 269.

108.——Undisclosed Principal.—Purchaser of coal, having reason to believe he is dealing with the principal, can set up, in the action for the price, any defense he has against the agent.—Eldridge v. Finnegar, Okl., 105 Pac. 334.

109. **Principal and Surety**—Part Performance.—An obligee may waive part performance of a contract, without discharging the sureties from liability for the due performance of the remainder.—Revel Realty & Securities Co. v. Maxwell, 119 N. Y. Supp. 257.

110. **Public Lands**—Sale Before Patent.—A claimant under the Oregon donation act who has not made final proof, but occupied the land for more than four years could make a valid deed of his rights after Amendatory Act July 17, 1854, sec. 2, by which the provision in section 4 of the earlier act was repealed.—Sylvester v. State of Washington, U. S. S. C., 30 Sup. Ct. 25.

111. **Quieting Title**—Cloud on Title.—A recorded notice of a contract for sale of land held a cloud on title.—McGuinness v. Hargiss, Wash., 105 Pac. 233.

112. **Railroads**—Crossing Accidents.—In an action against a railroad for injuries at a crossing, where it is certain from the physical situation that the plaintiff must have seen the engine, if he stopped to look, the jury will not be permitted to believe his statement that he did stop and look, but did not see the engine.—Averbuch v. Great Northern Ry. Co., Wash., 104 Pac. 1103.

113. **Remedies**—Laches.—A remainderman delaying until after the death of the life tenant before asserting his rights held not guilty of laches.—McCall v. McCall, Mich., 123 N. W. 550.

114. **Sales**—Breach of Contract.—The contract of a seller of an automobile to replace such parts "as may break in normal service" does not bind him to replace parts which are worn or defective.—Barry v. American Locomotive Automobile Co., 119 N. Y. Supp. 237.

115.——Breach of Warranty.—Held, that the buyer, in case of an executed sale, cannot rescind for breach of warranty; but his sole remedy is an action for damages.—Wirth v. Fawkes, Minn., 123 N. W. 661.

116.——Construction of Contract.—The contract of a manufacturer to furnish machinery held to require the delivery of machinery that will accomplish the results contemplated.—Bellows Falls, Mach. Co. v. Munising Paper Co., Mich., 123 N. W. 553.

117.—Failure to Deliver Within Agreed Time.—Where a seller agreed to deliver an engine within a certain time, he was liable for breach of contract on failure to so deliver, owing to the destruction of the plant where the engine was made and subsequent strikes.—Isaacson v. Starrett, Wash., 104 Pac. 1115.

118.——Implied Warranty.—Where the seller of goods is not the manufacturer thereof, held there is no implied warranty of freedom from latent defects.—Whitman v. Jacobson, 119 N. Y. Supp. 246.

119. **Set-Off and Counter Claim**—Subject Matter.—It is against the policy of the law to permit an executor to set-off his individual claim against a distributee.—In re Wentz's Estate, Pa., 74 Atl. 424.

120. **Vendor and Purchaser**—Executory Contract.—An assignment by the purchaser in an executory contract for the sale of land will not relieve him from liability thereunder, nor create any personal liability on the part of his assignee.—Midland County Sav. Bank v. T. C. Prouty Co., Mich., 123 N. W. 549.

121. **Witnesses**—Right to Disregard Entire Testimony.—Conscious falsehood or intentional misstatement must be found upon the part of a witness before the whole of his testimony may be disregarded.—Corrigan v. Wilkes-Barre & W. V. Traction Co., Pa., 74 Atl. 420.